Supreme Court, U.S.
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No. 00-1392

In The

Supreme Court of the United States

CHERIE SHIPP, JERRY GATES,

Petitioners,

versus

ROYCE L. MCMAHON, Sheriff of Webster Parish, Louisiana; Webster Parish Deputy Sheriffs STEVE CROPPER and BETTY SHIPP; and THEODORE RISER, JR., Sheriff of Webster Parish, Louisiana,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Preface:

On May 19-20, 1996, Dalton Shipp kidnapped, raped, and shot his estranged wife, Cherie Shipp. In this action, Cherie Shipp claims that since Dalton Shipp was not incarcerated in May of 1996, defendants failed to protect Cherie and thus violated her constitutional rights. Cherie Shipp alleges that if Dalton had been charged with aggravated battery instead of simple battery for a domestic violence incident that occurred in November of 1995, then Dalton might have been in jail on May 19, 1996, and thus, he would not have been able to carry out his criminal acts that night against Cherie.

The Court of Appeals found that defendants were entitled to qualified immunity and remanded to the district court to allow plaintiff to amend her complaint.

Question for Review:

1. Whether the Fifth Circuit Court of Appeals correctly found that the defendants were entitled to qualified immunity since the law of equal protection in the domestic violence context was not clearly established in 1996.

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STATEMENT REGARDING JURISDICTION

The District Court denied defendants' motion to dismiss based on qualified immunity. On rehearing, the Fifth Circuit Court of Appeals granted defendants' motion based on qualified immunity and remanded this matter to the District Court to allow plaintiff another opportunity to amend her Complaint. Plaintiff seeks to have this Court review the Fifth Circuit's ruling that granted qualified immunity.

An order dismissing claims against the defendants on the basis of qualified immunity while plaintiffs still have other claims pending in the district court would not be appealable in the circuit courts. The circuit courts have uniformly held that such an order does not satisfy the collateral order doctrine. Unlike an order that denies a defendant's qualified immunity, an order granting qualified immunity may be effectively reviewed after final judgment. *Baird v. Palmer,* 114 F.3d 39 (4th Cir. 1997).

Petitioners are still proceeding against the defendants-respondents in the district court. This Court should refuse to review this matter since it does not satisfy the collateral order doctrine.

STATEMENT OF THE CASE

During the night of May 19, 1996, Cherie Shipp and Dalton Shipp, who were going through a divorce, were talking at Cherie's apartment. Cherie voluntarily left her apartment with Dalton and got into his car. Later that

night they went to their former matrimonial domicile, and Dalton raped and shot Cherie.

Cherie claims that if Dalton had been in jail, he could not have hurt Cherie. Cherie alleges that if Dalton had been charged with aggravated battery instead of simple battery for a separate incident that occurred in November of 1995, then Dalton might have been in jail and thus not able to carry out his criminal acts. Basically, Cherie claims that law enforcement officers violated her right to equal protection by failing to ensure that Dalton was charged with a more serious crime for the November 1995 incident and then appropriately prosecuted and sentenced.

REASONS FOR DENYING THE WRIT

I. The Fifth Circuit correctly applied *Wilson v. Layne* in determining that the relevant law was not clearly established.

Defendants-Respondents filed a motion to dismiss based on qualified immunity. The district court denied defendants' motion. Defendants appealed to the Fifth Circuit Court of Appeals. Initially, the Court of Appeals agreed with the district court finding that the law of equal protection was clearly established. *Shipp v. McMahon*, 199 F.3d 256 (5th Cir. 2000). On rehearing, however, the Fifth Circuit judges unanimously *disagreed* with the district court judges and found that the relevant law was not clearly established. The Court of Appeals vacated its initial opinion and granted defendants' motion based on qualified immunity. *Shipp v. McMahon*, 234 F.3d 907 (5th Cir. 2000). According to this Court,

when "judges thus disagree on a constitutional question," law enforcement officers are entitled to qualified immunity. *Wilson v. Layne*, 526 U.S. 603, 119 S.Ct. 1692, 1701, 143 L.Ed.2d 818 (1999).

> The officers in this case cannot have been expected to predict the future course of constitutional law. . . . If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.

Wilson, 1701; *Procunier v. Navarette*, 434 U.S. 555, 98 S.Ct. 855, 860, 55 L.Ed.2d 24 (1978).

Petitioner, Cherie Shipp ("Shipp"), contends that the Fifth Circuit used the wrong law to determine whether the relevant law was clearly established.[1] According to Shipp, the Fifth Circuit judges erred when they looked to a case of "controlling authority in their [own] jurisdiction" and found the relevant law was not clearly established. *Wilson*, 1700. In essence, Shipp argues that the law of determining whether the relevant law was clearly established is not clearly established; therefore, in this case, defendants are not entitled to qualified immunity. The flawed logic is designed to distract and divert. Shipp claims that the Fifth Circuit ignored a "consensus of cases of persuasive authority" from other circuits. *Wilson*, 1700. However, in order to reach the alleged "consensus" from

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[1] Shipp's first contention is stated as follows: "May a circuit court disregard 'a consensus of cases of persuasive authority,' *Wilson v. Layne*, 526 U.S. 603, 617 (1999), from other circuits in ascertaining clearly established law for purposes of qualified immunity?" Petition for a Writ of Certiorari ("Petition"), p. 5.

other circuits, Shipp would have the Fifth Circuit ignore binding authority from the Fifth Circuit itself, i.e., *McKee v. City of Rockwall, Tex.*, 877 F.2d 409 (5th Cir. 1989), *cert. denied*, 493 U.S. 1093, 110 S.Ct. 727, 107 L.Ed.2d 746 (1990).[2]

In searching for clearly established law, courts look first to the Supreme Court. If this Court has not clearly identified the contours of the relevant law, courts turn to "cases of controlling authority in their jurisdiction at the time of the incident." *Wilson*, at 1700. If their own circuit is silent on the matter, courts may then look to see if a "consensus of cases of persuasive authority" exists. *Id.*

In this case, the Fifth Circuit judges found there was no Supreme Court case on point, so they turned to "controlling authority in their jurisdiction at the time of the incident." *Id.* They found that *McKee v. City of Rockwell*, supra, a prior Fifth Circuit case, provided the proper precedent for determining whether the law was clearly established. *McKee* addressed an equal protection claim in the domestic violence context, but explicitly left pivotal issues unresolved. *Shipp*, 234 F.3d 912-913. Since the Fifth Circuit found that its own binding precedent was "controlling authority," Cherie Shipp accuses the Fifth Circuit of using a "tunnel-vision approach." Petition, p. 6. The "conflict among the circuits" which Shipp perceives does not exist in this case. Petition, p. 6.

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[2] Shipp would have the Fifth Circuit ignore its own case law because *McKee* discussed the law of equal protection while granting a motion for summary judgment filed by defendants, and, therefore, according to Shipp, *McKee* is not good nor relevant law.

The critical issues that *McKee* left open had not been resolved on May 19, 1996. *Shipp*, 234 F.3d 913, 915. There had been no intervening authoritative decision. *Shipp*, at 915. Shipp's handful of cases from other circuits do not constitute a "consensus" of persuasive authority. Those decisions did not even address, much less settle, the issues which *McKee* carefully identified as unresolved. Those decisions do not articulate nor support Shipp's position in a consistent nor well reasoned manner. To find that the law was clearly established in the Fifth Circuit in 1996 would mean that *McKee* had somehow, unwittingly been overruled by an "untidy body of case law." *Colaizzi v. Walker*, 812 F.2d 304, 308 (7th Cir. 1987).

Shipp has not provided any acceptable rationale for having the Fifth Circuit ignore its own case law. For a court to follow its own decisions is not "tunnel-vision," as Shipp argues. In determining whether the relevant law is clearly established, courts should look for "cases of controlling authority in their jurisdiction at the time of the incident." *Wilson*, at 1700. *McKee* is a case of controlling authority in the Fifth Circuit. Accordingly, in this case, the Fifth Circuit's basic research was "confined to precedent from our circuit or the Supreme Court." *Shipp*, 915. There was no need nor reason to look any further.[3]

As indicated above, the judges who heard and studied this matter in detail disagreed on the constitutional questions involved. That disagreement alone is sufficient

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[3] As demonstrated below, the result (i.e., that defendants are entitled to qualified immunity) would be the same even if the Fifth Circuit had found it necessary to search other jurisdictions for some kind of persuasive authority.

to establish the defendants' qualified immunity. *Wilson*, 1701. In this case, Shipp's convoluted argument that courts should use "persuasive authority" rather than "controlling authority" lacks merit.

II. The Fifth Circuit correctly found that the law of equal protection in the domestic violence context was not clearly established in 1996.

To overcome defendants' qualified immunity, Shipp must demonstrate that the law of equal protection in the domestic violence context was clearly established prior to May 19, 1996. As her basic premise, Shipp assumes that the law was clearly established, and then concludes that the Fifth Circuit was wrong since it found the law was not clearly established. Shipp's circular reasoning begs the question.

In her second contention to this Court, Shipp argues that the Fifth Circuit erred by requiring the law to be identified on "too specific a level." Petition, p. 10. Shipp claims that the appropriate "level of factual similarity" for determining clearly established law is found in the Equal Protection Clause, *DeShaney*'s[4] Footnote 3, and "the floor debates of Reconstruction-era Congress." Petition, pp. 9-10. Shipp's alleged "clearly established" law exists on far too abstract a level. Shipp attempts to identify the law on a "level of generality" that bears "no relationship

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[4] *DeShaney v. Winnebago County, et al.*, 489 U.S. 189, 109 S.Ct. 998 (1989).

to the 'objective legal reasonableness' that is the touchstone of *Harlow*." *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987).

What does Shipp say the law is? Shipp has repeatedly been challenged to identify the clearly settled law which she claims existed. However, Shipp has consistently failed to identify any prevalent authority on a relevant level that recognizes or establishes the law to be as she maintains. Stripped of the colorful excess and generalities, Shipp proposes that police officers should be liable when a woman is injured by her husband in a domestic violence incident, if the husband has been involved in some other incident for which he might have been arrested or could have been sentenced to serve some time in jail.

Originally, Shipp alleged that officers violated the Due Process Clause of the Fourteenth Amendment by failing to protect Shipp. However, the due process claim was dismissed pursuant to *DeShaney v. Winnebago County*, supra. Shipp then added a conclusory allegation that defendants had an intent to discriminate. By adding the bald, conclusory allegation, Shipp attempted to transform her proposition that is not cognizable under the Due Process Clause in a viable Equal Protection claim. According to *DeShaney* and *McKee*, "There is no constitutional violation when the 'most that can be said of . . . state functionaries . . . is that they stood by and did nothing when suspicious circumstances dictated a more active role.' 109 S.Ct. at 1007. Footnote three does not permit plaintiffs to circumvent the rule of *DeShaney* by converting every Due Process claim into an Equal Protection claim via an allegation that state officers exercised

their discretion to act in one incident but not in another." *McKee*, 877 F.2d at 413. Thus, plaintiffs are not allowed to take an uncognizable Due Process claim and convert it into an Equal Protection claim by simply adding conclusory allegations of improper motive.

When qualified immunity is raised, plaintiff has the burden to show "clearly established . . . authority" that finds "the law to be as the plaintiff maintains." *Garramone v. Romo*, 94 F.3d 1446, 1451 (10th Cir. 1996). Without any meaningful analysis, Shipp refers to a short string of cases for an alleged "consensus" of persuasive authority. Petition, p. 5. However, the handful of cases that Shipp refers to are not sufficient to clearly establish well developed legal principles on the relevant level.

> A mere handful of decisions of other circuits and district courts, which are admittedly novel, cannot form the basis for a clearly established constitutional right. . . .

Ohio Civil Serv. Employees Ass'n v. Seiter, 858 F.2d 1171, 1177-78 (6th Cir. 1988).

> We cannot extract a clearly established right from a somewhat confusing body of caselaw through the use of hindsight, or permit claims of qualified immunity to turn on the eventual outcome of a hitherto problematic constitutional analysis.

Soto v. Flores, 103 F.3d 1056, 1065 (1st Cir. 1997).

The cases cited by Shipp do not reveal the law to be as Shipp maintains. Most of the cases are not even relevant in the qualified immunity analysis. *Soto v. Flores* was not decided until 1997, a year after the Shipp incident.

McDonald v. City of Chicago[5] is an unpublished district court opinion from another circuit. *Hakken v. Washtenaw County*[6] is another district court case from another circuit; it was not decided until Sept. 29, 1995, just weeks prior to Dalton Shipp's initial arrest in November of 1995. *Hynson v. City of Chester*[7] and *Watson v. City of Kansas City*[8] were decided prior to *DeShaney* and *McKee*, and thus, could not have authoritatively addressed the concerns nor answered the questions left open by *DeShaney* and *McKee* for a law enforcement officer on the street in the Fifth Circuit.[9] The cases cited by Shipp are readily distinguishable from the propositions which Shipp advocates. None of them find individual law enforcement officers liable for a constitutional violation. They address conduct that is more egregious than that described by Shipp; yet the cases do *not* define the outer limits of legally permissible police conduct.

Two of Shipp's cases are revealing however (and contrary to Shipp's arguments) in that they find that *just prior* to the Shipp incident and *just after* the Shipp incident the relevant law was *not* clearly established.

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[5] 1994 WL 732865 (N.D. Ill. Dec. 23, 1994).

[6] 901 F.Supp. 1245 (E.D.Mich. 1995).

[7] 864 F.2d 1026 (3d Cir. 1988).

[8] 857 F.2d 690 (10th Cir. 1988).

[9] *DeShaney* had a profound impact on Fourteenth Amendment rights and the nature of § 1983 claims against law enforcement officers for an alleged failure to protect a person from the criminal acts of a third person. Any alleged clearly established law must consider the effect of *DeShaney*'s principles and rationale and would have necessarily been written after *DeShaney*.

> Currently, there is no definitive Sixth Circuit or Supreme Court decision determining that police policies for handling domestic disputes may violate the victims' right to equal protection on the basis of their sex or status as victims of domestic violence. At the time of the alleged incidents in this matter, it was not "clearly established" that the equal protection rights of women and victims of domestic violence was violated when the police accorded different treatment to their calls for assistance in a domestic dispute. . . . The individual Defendants' motion for summary judgment should be granted.

Hakken, 901 F.Supp. at 1254 (E.D.Mich. 1995).

> In a matter of first impression for this court, we adopt [a] standard for section 1983 equal protection claims brought by domestic violence victims.

Soto, 103 F.3d at 1066 (1st Cir. 1997).

The clearly established law inquiry requires the court to "determine the extent to which the relevant constitutional doctrine is developed in the context of similar fact patterns . . . For a defendant to be held liable, then, relatively little legal ambiguity can be tolerated." Nahmod, Sheldon H., *Civil Rights and Civil Liberties Litigation – The Law of Section 1983*, 4th Ed., Vol. 2, § 8:18, "What is Clearly Settled Law?" pp. 57-58. The cases cited by Shipp do not delineate the outer parameters of lawful conduct. Shipp's cases describe factual scenarios in which the conduct of the officers involved does *not* violate the constitution. The cases do not set forth well developed

legal principles that reveal the bright line between lawful and unlawful conduct in the domestic violence context.

The concept of "clearly established law" in a civil case is the equivalent of the "fair warning" requirement in the criminal context. *United States v. Lanier*, 117 S.Ct. 1219, 1227 (1997). "Fair warning" requires that the law be written "in language that the common world will understand what the law intends to do if a certain line is passed. To make the warning fair, so far as possible, the line should be clear. . . . The principle is that no man shall be held . . . responsible for conduct which he could not reasonably understand to be proscribed. . . . The fair warning requirement . . . bars enforcement of a [law] which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . . Fair warning [is ensured] by so resolving ambiguity in a [law] as to apply it only to conduct clearly covered. . . . [The fair warning requirement] bars courts from applying a novel construction of [law] to conduct that neither [a] statute nor any prior judicial decision has fairly disclosed to be within its scope." *Id.* at 1224-1225.

In order for the law to be "clearly established" in the relevant sense, qualified immunity requires there be "fair warning" and a clear outline of the boundaries of permissible conduct. *United States v. Lanier*, 117 S.Ct. 1219, 1227 (1997). To be clearly established, the law must be defined in a particularized, fact-specific manner. *Anderson v. Creighton*, supra.

In *McKee*, several unanswered questions concerning the relevant area of constitutional law were expressly left

open. Those questions cannot be retroactively resolved. In cases where there is a legitimate question whether the law is settled, it cannot be said that the law was clearly established. *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 2820, n. 12 (1985).

> When an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary. [*U.S. v. Lanier*, 117 S.Ct. at 1227.]

In *McKee*, facts and circumstances which were more egregious and more immediate than those alleged by Shipp were not sufficient to show there was differential or discriminatory treatment toward women. Thus, the Fifth Circuit expressly did "not decide whether other elements of an equal protection claim were present." *McKee*, at 416.

> In particular, we do not decide whether . . . a policy discriminating against victims of domestic violence . . . would constitute intentional discrimination against women . . . or whether that policy would discriminate against a protected minority within the meaning of *DeShaney*'s footnote three. [*Id.*]

The issues of whether a policy that discriminates against domestic violence victims constitutes unlawful discrimination against women or discrimination against a protected class were expressly not answered and were not clearly established. Further, what constitutes the "other elements of an equal protection claim" for selective denial of protective services was not addressed and was

expressly not answered. *Id.*[10] At the time of the Shipp incident, these issues had not been revisited and clarified by this Court or any other court.

On an abstract level, the Fourteenth Amendment prevents a State from "selectively deny[ing] its protective sevices to certain disfavored minorities." *DeShaney,* 109 S.Ct. at 1004, n. 3. However, on the more relevant fact-specific level, there is no constitutional violation when the most that can be said is that police "stood by and did nothing." *DeShaney,* 109 S.Ct. at 1007; *McKee* at 413. A law enforcement officer has discretionary authority. Simply because an officer could make an arrest, he is not under any constitutional obligation to do so. *McKee* at 414. Plaintiffs are not permitted to circumvent an officer's discretionary authority by converting a Due Process claim into an Equal Protection claim by simply adding a conclusory allegation of intent to discriminate. *McKee* at 413.

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[10] Shipp argues that this is a "straight forward claim of discriminatory enforcement of the laws." Petition, pp. 8-9. However, Shipp's arguments fail to distinguish between discriminatory enforcement of criminal laws and selective denial of governmental services. Shipp does not claim she was impermissibly arrested because she was a woman. Shipp claims that she did not receive some unspecified benefit or protective service. Note that Shipp never identifies anyone who received the benefit which Shipp says she did not get.

CONCLUSION

Section 1983 is not the insurer of every crime victim. Society is not prepared to charge law enforcement officers with the burden of providing monetary damages to victims of domestic abuse simply because a victim makes conclusory allegations of intent to discriminate. The judges involved in this case did not agree on what constituted the law of equal protection in the domestic violence context prior to 1996. Thus, "it is unfair to subject police to money damages" for failing "to predict the future course of constitutional law." *Wilson,* at 1701.

The Fifth Circuit Court of Appeals was correct in finding that the defendants are entitled to qualified immunity. Shipp's writ application should be denied.

Respectfully submitted,

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